No. 852

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

AMERICAN MANUFACTURING COMPANY OF TEXAS, W. J. GOURLEY, AND W. H. THOMPSON, PETITIONERS

vs.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF AND WRITTEN ARGUMENT IN REPLY TO OPPOSITION BRIEF

No. 852

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

AMERICAN MANUFACTURING COMPANY OF TEXAS, W. J. GOURLEY, AND W. H. THOMPSON, PETITIONERS

vs.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF AND WRITTEN ARGUMENT IN REPLY TO OPPOSITION BRIEF

To Said Honorable Court:

The opposition brief filed for the National Labor Relations Board requires a reply. The argument in the brief is divided into five parts, dealing with the five questions which are raised.

1.

Respondent first argues that there is no conflict with the Express Publishing Company case, 312 U. S. 426. Respondent thereupon attempts to show that there was a similarity between the notices issued in June, 1942,

and those practices which were involved in the 1938 case. Respondent, by this argument, disinherits the Circuit Court's decision. The Circuit Court in the immediate case, did not find that there was any relationship, connection with or similarity between the two practices, but rather decided as a matter of law that there was no necessity for any such similarity, connection, or relation. Respondent makes no effort to sustain such ruling of the Circuit Court, and by indirection at least, admits that the Circuit Court erred.

It can be noted with much interest that in the original Petition For a Rule to Show Cause which was filed with the Circuit Court in November, 1942, the N. L. R. B. did not allege that the acts which occurred in June, 1942, had any relation to, connection with or similarity to the acts and practices which the decree of December 9th, 1938 dealt with. The record as made in the Circuit Court in the contempt proceedings failed to show any such relationship, connection or similarity.

The decision of the Circuit Court in the immediate case is clearly in conflict with the Express Publishing Company decision. Necessarily the adjudgment of contempt is erroneous and should be reversed. It should also be remembered that if the Circuit Court's decision is permitted to stand, it will be precedent as to all future utterances and speech of petitioners. In other words, anything which any officer or employee of American Manfacturing Company might say in the future, whether the same was similar to, related to or connected with what had taken place in 1937 and 38, could be found by the Circuit Court to be violative of

its prior decree and the person making the utterance could be punished for contempt.

2.

In trying to show that there is no conflict between the Circuit Court's decision in the immediate case and the Virginia Electric & Power case, respondent once again departs from the Circuit Court's opinion and goes far beyond what the Circuit Court held. The decision of the Circuit Court in the immediate case is based solely and exclusively on the June notices. The Circuit Court completely ignored the Virginia Electric & Power case. Respondent now attempts to supply the "background" which the Virginia Electric & Power case requires, but which the Circuit Court in the immediate case did not require. The record in this case as made by the Petition For a Rule and by the answer clearly shows that there was no actual interference, restraint or coercion.

In a very recent case, the Circuit Court of Appeals for the Second Circuit, has made a most instructive analysis of the Virginia Electric & Power case. This case entitled N. L. R. B. vs. American Tube Bending Company, opinion dated April 5th, 1943, has not been printed but probably will be by the time this matter is considered. In this case, just before the employees were to vote whether they would go union or non-union, the President of the company issued a letter to all of the employees. This letter, among other things, advised that the company was paying high wages. It went on to ask the men

> "to what kind of leadership are you going to entrust your future with the company? Is it unselfish or is it not? Is it interested in your personal individual welfare, or is it self-seeking? On the basis of its past record, is it open and above board and dependable, or don't you know?"

In a speech delivered to the employees, just before the election, the President said among other things,

> "You have to ask yourself why it is that total strangers, all of a sudden, become so interested in your welfare? Who are they? What have they done? What more can they do for you than you have already done for yourself? You have to ask yourself whether the management of the company that built this factory, that bought the material, that bought the machinery, and provided the job, you have to ask yourself, I say, whether or not this management is best for you in the long run."

It must be remembered that in the Virginia Electric and in the American Tube Bending case, the Courts were called upon to sustain a finding of facts which had already been made, and hence all intendments and presumptions were indulged in favor of the validity of the findings. In our immediate case however it was the burden of the N. L. R. B. to prove by a preponderance of the evidence that the contemptuous acts had taken place. Obviously it would take a greater quantum of proof and would take proof of a more decisive nature, to prove a charge of contempt in an original proceeding than it would to sustain a finding of a unfair labor practice already made by the Labor Board. In the Petition For Rule to Show Cause

in the immediate case, the petitioner set out the notices which were circulated in June, 1942, and it made the allegations (which were purely conclusions) that there had been an interference, restraint and coercion. In the answer filed in the Circuit Court, these petitioners (as respondents) denied that there had been any such interference, restraint or coercion and then plead concrete facts showing that there had in actuality been no such interference, restraint or coercion. No testimony was adduced in this contempt proceeding. It was decided on the basis of the petition and the answer. It is clear that the Circuit Court decided the case on the basis of inferences, which were drawn from the petition, and not on the basis of any established facts.

There is difference in language only, as between the utterances involved in the Virginia case and the American Tube Bending case, on the one hand, and those involved in the immediate case. The following ruling made in the American Tube Bending case is equally applicable to the immediate case, where the court, after remarking that the company did not conceal its preference for no union whatever, said:

> "But there was no intimation of reprisal against those who thought otherwise. If there was a basis for finding that such a presentation of the employer's side might be a covert threat to the recalcitrant, there was as much basis in the Virginia case."

Is there such a difference in the wording of the notices in the immediate case, and the wording used in the Virginia case and the American Tube Bending

case, that this Court can say that such notices in themselves established, by a preponderance of the evidence, an interference, restraint and coercion, while at the same time adhering to its ruling in the Virginia case, that there was no such interference, restraint or coercion even with intendments indulged in favor of the sufficiency of the Board's finding.

3.

Respondent argues that the question as to the method of purge as handed down by the Circuit Court, was not properly raised in such Court, and therefore cannot be made a basis for review. The case of Helvering v. Wood cited for comparison is not in point. With reference to the argument that no complaint was made in the petition for rehearing filed in the Circuit Court, an examination of the record will show that the petition for rehearing was filed as required by the Circuit Court rules, prior to the time that the Circuit Court entered its formal decree in the case. It was not until such formal decree was entered that these petitioners knew that the Circuit Court desired them to post the notices and do these other things by way of purge. The formal decree of the Circuit Court outlining the conditions of purge, is certainly a subject for review by this Honorable Supreme Court.

Respondent does not answer the questions posed in the Petition for a Writ of Certiorari, as to whether the Circuit Court can provide a method of purge and as to the nature of purge which the Circuit Court is authorized to impose.

4.

Respondent states that error cannot be predicated on the question of holding the individuals in contempt, because this matter was raised in the petition for rehearing the first time. It should be remembered that this proceeding was begun as an original proceeding for contempt in the Circuit Court, and there was no necessity for any assignment of error in the contempt proceedings in the Circuit Court. The only question is whether the record as made in the Circuit Court justified the Court's holding the individuals to be in contempt. We submit that it did not.

5.

The argument which petitioners made on the basis of the Pacific Greyhound case is in part cumulative of the argument made under the Express Publishing Company case. It is not argued that the passage of time will in itself destroy a decree. We have said and still say that the passage of time is an element which must be considered in determining whether a prior injunction has been violated. The Circuit Court failed to consider such element, and error is properly assigned to this failure.

Wherefore, petitioners respectfully submit that their petition for review on writ of certiorari should be granted.

U. M. Simon,
Dan Waggoner Bldg.,
Fort Worth, Texas,

Richard U. Simon,
Petroleum Building,
Fort Worth, Texas,
Attorneys for Petitioners.